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Supreme Court, U.S.
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No. 00-1407

IN THE

SUPREME COURT OF THE UNITED STATES

CITY OF ELKHART,

Petitioner,

v.

WILLIAM A. BOOKS AND MICHAEL SUETKAMP.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Seventh Circuit

BRIEF FOR THE STATES OF ALABAMA, MISSISSIPPI, NEBRASKA, NORTH DAKOTA, OHIO, SOUTH CAROLINA, AND TEXAS, AND THE COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS, AS *AMICI CURIAE*, IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the Establishment Clause require a city to remove from city property a 40-year-old monument containing the text of the Ten Commandments which is part of a larger civic display?

2. Do respondents, whose "injury" consists of no more than the psychological consequences allegedly produced by observation of conduct with which they disagree, have standing under Article III to bring an Establishment Clause challenge?

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BRIEF FOR *AMICI CURIAE* IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

The States of Alabama, Mississippi, Nebraska, North Dakota, Ohio, South Carolina, and Texas, and the Commonwealth of the Northern Mariana Islands (collectively "the *amici* States") respectfully submit this brief as *amici curiae* pursuant to Supreme Court Rule 37.4. The *amici* States submit this brief in support of the petition for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit filed in this case by the City of Elkhart, Indiana.

INTEREST OF *AMICI CURIAE*

The States and Commonwealth joining in this brief as *amici curiae* have a profound interest in protecting the free-speech rights and religious liberties of their citizens. The *amici* States also have an interest in providing their public officials clear, reliable guidance for use in addressing issues concerning the presence of monuments, plaques, and other items with religious references on public property. Finally, the *amici* States do not wish to see their public buildings and lands defaced by civil litigation based upon a misinterpretation of the Establishment Clause. The *amici* States thus have an interest in seeing this case resolved in a fashion that respects their citizens' religious liberties while affording their public officials sufficient guidance to manage public buildings and lands appropriately.

SUMMARY OF ARGUMENT

This case provides an appropriate opportunity to clarify the meaning and scope of this Court's 5-4 *per curiam* decision in *Stone* v. *Graham*, 449 U.S. 39 (1980). Sup. Ct. R. 10(c). It also affords an opportunity to provide further guidance to public officials on the permissible acknowledgment of religious aspects of this Nation's history and culture on public grounds. *Id.* Finally, a decision in this case would resolve a split in the circuits and between a federal court of appeals and a state supreme court on this particular issue, providing much-needed guidance for numerous cases pending below. Sup. Ct. R. 10(a). For these reasons, the petition for a writ of certiorari should be granted.

ARGUMENT

In Bamiyan, Afghanistan, the Taliban regime recently completed the destruction of two giant, historic monuments of the Buddha that reflected Afghanistan's pre-Islamic culture. 147 Cong. Rec. H923 (daily ed. Mar. 14, 2001) (statement of Rep. Schiff). The leader of the Taliban, Mullah Mohammad Omar, condemned the Bamiyan Buddhas as "shrines of infidels" and claimed that they violated the tenets of Islam. 147 Cong. Rec. S3222 (daily ed. Mar. 30, 2001) (statement of Sen. Akaka) (noting that the Taliban's actions violated the teachings of Islam and quoting Qur'an 109:6). Virtually the entire world has risen to condemn the Taliban's intolerant iconoclasm. *See* G.A. Res. 243, U.N. GAOR, 55th Sess., U.N. Doc. A/RES/55/243 (2001);[1] *see also* S. Con. Res. 30,

[1] More than 90 nations sponsored the United Nations General Assembly's resolution condemning the destruction of the Bamiyan statues, including Afghanistan, Andorra, Armenia, Australia, Austria,

107th Cong. (2001); H.R. Con. Res. 52, 107th Cong. (2001).

At first blush, the standing Buddhas of Bamiyan, Afghanistan, might seem to have little in common with a lawsuit concerning a Ten Commandments monument in Elkhart, Indiana. Upon closer inspection, however, the two situations have disturbing similarities. The Taliban insisted on viewing the standing Buddhas in purely religious terms, as "shrines of infidels" for idol worship, thus divorcing them from their historical and cultural context and ignoring their artistic attributes. Based upon this narrow view, the Taliban destroyed the Buddhas to remove them from public sight.

In this case, Respondents similarly insist that the Ten Commandments be viewed from a purely religious perspective, minimizing their historical, cultural, moral, and literary qualities. Based upon this narrow view of the Decalogue, respondents convinced the Court of Appeals that the display of the Ten Commandments in Elkhart served *no* secular purpose under the first prong of

Azerbaijan, Belgium, Benin, Bhutan, Bolivia, Bosnia and Herzegovina, Brazil, Bulgaria, Cambodia, Canada, Chile, Colombia, Costa Rica, Croatia, Cyprus, Czech Republic, Denmark, Dominican Republic, Ecuador, Egypt, El Salvador, Estonia, Fiji, Finland, France, Georgia, Germany, Greece, Guatemala, Haiti, Hungary, Iceland, India, Iran, Ireland, Israel, Italy, Japan, Kazakhstan, Liberia, Liechtenstein, Lithuania, Luxembourg, Madagascar, Malta, Mauritius, Mexico, Federated States of Micronesia, Monaco, Mongolia, Myanmar, Nepal, Netherlands, New Zealand, Nicaragua, Norway, Panama, Paraguay, Peru, Poland, Portugal, Republic of Korea, Republic of Moldova, Romania, Russian Federation, Samoa, San Marino, Sierra Leone, Slovakia, Slovenia, Solomon Islands, Spain, Sri Lanka, South Africa, Suriname, Sweden, Tajikistan, The former Yugoslav Republic of Macedonia, Togo, Turkey, Ukraine, United Kingdom, United States, Uruguay, Uzbekistan, and Yugoslavia.

the *Lemon*[2] test, *see* Pet. App. at 16a–18a, and the monument apparently must be removed if this Court does not intervene.[3] That respondents based their argument in large part upon their interpretation of this Court's 5-4 *per curiam* decision in *Stone* v. *Graham*, 449 U.S. 39 (1980), is most disturbing of all.

I. THIS CASE PRESENTS AN APPROPRIATE OPPORTUNITY TO CLARIFY THE MEANING AND SCOPE OF *STONE* V. *GRAHAM*.

A. The Holding in *Stone* v. *Graham* Is Limited to the Context of Public School Classrooms.

In *Stone* v. *Graham*, a closely divided Court "conclude[d] that *Kentucky's statute* requiring the posting of the Ten Commandments *in public schoolrooms* had no secular legislative purpose, and is therefore unconstitutional." 449 U.S. at 41 (emphasis added). The statute in *Stone* v. *Graham* specifically required each display of the Ten Commandments to carry a notation referring to their

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[2] *Lemon* v. *Kurtzman*, 403 U.S. 602, 612–13 (1971).

[3] The panel majority below left it to the district court to formulate an appropriate remedy. *See* Pet. App. at 24a–25a. In his dissent, however, Judge Manion correctly observed that

> there may be no remedy other than removal because the court concludes that the City lacked a secular purpose justifying its decision to leave undisturbed the Ten Commandments monument. Thus, *it appears that under the court's reasoning, no matter what Elkhart does to dilute the religious aspects of the Ten Commandments, the monument will still be unconstitutional* because it fails *Lemon*'s first prong by not having a secular purpose.

Id. at 50a–51a (Manion, J., concurring in part and dissenting in part) (emphasis added).

secular application. *Id.*; *see* Ky. Rev. Stat. § 158.178(2) (1996). The state trial court concluded that the "avowed" purpose of the statute was secular, albeit "self-serving." 449 U.S. at 41. The trial court also concluded that "the fact that the Ten Commandments spring from a religious well does not in itself forever divorce their use for a secular purpose." App. to Pet. for Cert. at 38, *Stone* v. *Graham*, No. 80-321.

This Court concluded, however, that "[t]he pre-eminent purpose for posting the Ten Commandments *on schoolroom walls* is plainly religious in nature." 449 U.S. at 41 (emphasis added). As the language italicized here and in the preceding paragraph indicates, however, the Court in *Stone* v. *Graham* was careful to limit its ruling to the specific context of Kentucky's statute requiring the Ten Commandments to be posted in public school classrooms. The petitioners in *Stone* v. *Graham* likewise stressed the unique environment of the public schools. Given "the compulsory attendance laws applicable to students," petitioners asserted that there would be "no available method for a student offended by the posting of the Ten Commandments to avoid confrontation with the religious display." Pet. for Cert. at 7, *Stone* v. *Graham*, No. 80-321. Petitioners argued "that the posting of the Commandments is an effort to inculcate particular religious beliefs in a *captive audience of public school children who are compelled to attend* . . . ." *Id.* at 13 (emphasis added).

As a *per curiam* decision rendered without briefing on the merits or oral argument, the opinion in *Stone* v. *Graham* does not explain the Court's reasoning in great detail. Although this Court is "less constrained to follow precedent where . . . the opinion was rendered without full briefing or argument," *Hohn* v. *United States*, 524

U.S. 236, 251 (1998),[4] it is clear that the decision in *Stone* v. *Graham* was never meant to presumptively invalidate all displays of the Decalogue on public property under the "purpose" prong of the *Lemon* test. The decision was limited to the unique context of public schools, where attendance is compulsory, and a state statute requiring the display to be present in each and every classroom.

Given the unique context of *Stone* v. *Graham*, the Court of Appeals erred in applying it to invalidate the display of the Ten Commandments monument in this case. This case thus provides an appropriate opportunity to clarify that *Stone* v. *Graham* does not presumptively invalidate all displays of the Ten Commandments on public property.

B. The Religious Context of the Ten Commandments Does Not Diminish Their Secular Importance.

This Court observed in *Stone* v. *Graham* that "[t]he Ten Commandments are undeniably a sacred text in the Jewish and Christian faiths." 449 U.S. at 41. The Court did not deny, however, that the Ten Commandments are also "at once religious and secular, as, indeed, one would expect considering the role of religion in our traditions." *Anderson* v. *Salt Lake City Corp.*, 475 F.2d 29, 33–34 (10th Cir.), *cert. denied*, 414 U.S. 879 (1973).[5] In other

[4] "The Court, of course, at times has said that summary action here does not have the same precedential effect as does a case decided upon full briefing and argument." *Gray* v. *Mississippi*, 481 U.S. 648, 651 n.1 (1987) (citing *Edelman* v. *Jordan*, 415 U.S. 651, 671 (1974)).

[5] In his Reply Brief, respondent Graham quoted this excerpt from *Anderson*. *See* Reply Br. to Pet. for Cert. at 6, *Stone* v. *Graham*, No. 80-321.

words, there was no suggestion in *Stone* v. *Graham* that the Ten Commandments must presumptively be viewed by the courts in exclusively religious terms in all situations. Indeed, the Court's opinion suggests otherwise—that the Ten Commandments could be included in "an appropriate study of history, civilization, ethics, comparative religion, or the like." 449 U.S. at 42; *see also Lynch* v. *Donnelly*, 465 U.S. 668, 680 (1984) ("Focus exclusively on the religious component of any activity would inevitably lead to its invalidation under the Establishment Clause.").

This case presents an excellent illustration of the Ten Commandments' secular—i.e., historical, cultural, and moral—importance. The Fraternal Order of Eagles ("FOE") distributed the Ten Commandments not in an effort to proselytize or provide religious instruction, but in an attempt to expose young people to recognized codes of behavior. Pet. App. at 110a, ¶ 3 (Aff. of E.J. Ruegemer). Indeed, the FOE rejected the idea until a nonsectarian version of the Decalogue could be formulated. *Id.* at 111a, ¶ 4; Pet. App. at 2a, 62a.

The City of Elkhart likewise never attempted to proselytize or give any sort of religious instruction using the Ten Commandments monument. There is no compulsion to look at the monument, as was the case in *Stone* v. *Graham*, where there was "no available method to avoid . . . the . . . display." Pet. for Cert. at 7, *Stone* v. *Graham*, No. 80-321. The monument is located outside the Municipal Building, not inside a public school. Anyone can avoid the Elkhart monument simply by looking the other way or using a different door to the Municipal Building. Passersby are free to look at the monument or ignore it. One pedestrian may see the monument and think "how nice," another "how quaint," a third "how ridiculous," and each is free to do so. They are not

compelled to study the Commandments or meditate on them. With an inscription indicating that the monument was a gift from the FOE, it is not even likely that ordinary passersby would attribute the monument to the City at all.

In short, in this case, the Ten Commandments need not be viewed in exclusively religious terms. Here, they serve a secular purpose as well—as a monument to America's cultural heritage—and contribute to a better understanding of our roots as a people and society. The Court of Appeals erred in ignoring these secular purposes for displaying the Ten Commandments.

Both the Tenth Circuit and the Supreme Court of Colorado have recognized the broader, secular importance of the Ten Commandments in holding that FOE monuments virtually identical to the monument at issue in this case could constitutionally remain on public property. *Anderson*, 475 F.2d at 33–34; *State* v. *Freedom from Religion Foundation, Inc.*, 898 P.2d 1013, 1014 (Colo. 1995), *cert. denied*, 516 U.S. 1111 (1996). Although *Anderson* predates *Stone* v. *Graham*, the Colorado decision directly addressed *Stone* v. *Graham* and recognized the limited context of the holding in that case. *Id.* at 1022–23.

The Court of Appeals' rejection of the City of Elkhart's legitimate secular purposes for retaining the Ten Commandments monument in this case also raises questions regarding the summary rejection, in *Stone* v. *Graham*, of the secular purposes for displaying the Ten Commandments as stated by the Kentucky legislature. Although a court need not accept a "sham" statement of secular purpose, *Edwards* v. *Aguillard*, 482 U.S. 578, 586–87 (1987), the Court of Appeals' rejection of the City's articulated, legitimate secular purposes appears highly questionable in the light of later decisions indicating this

Court's "reluctance to attribute unconstitutional motives to the states, particularly when a plausible secular purpose for the state's program may be discerned from the face of the statute." *Mueller* v. *Allen*, 463 U.S. 388, 394–95 (1983); *see also Wallace* v. *Jaffree*, 472 U.S. 38, 74–75 (1985) (O'Connor, J., concurring) ("If a legislature expresses a plausible secular purpose for a moment of silence statute in either the text or the legislative history, or if the statute disclaims an intent to encourage prayer over alternatives during a moment of silence, then courts should generally defer to that stated intent.") (footnotes omitted).

II. A DECISION IN THIS CASE WOULD PROVIDE MUCH-NEEDED GUIDANCE FOR NUMEROUS CASES PENDING BELOW AND FOR INNUMERABLE SIMILAR SITUATIONS.

There are currently a number of cases concerning public displays of the Ten Commandments pending in the lower courts. Published decisions in these cases include:

Kimbley v. *Lawrence County*, 119 F. Supp. 2d 856 (S.D. Ind. 2000) (granting preliminary injunction prohibiting county from erecting Ten Commandments monument on courthouse lawn);

Indiana Civil Liberties Union, Inc. v. *O'Bannon*, 110 F. Supp. 2d 842 (S.D. Ind. 2000) (granting preliminary injunction prohibiting Governor of Indiana from accepting Ten Commandments monument to be placed on grounds of state capitol to replace previous FOE monument that was vandalized by one of the plaintiffs), *appeal pending*, No. 00-3011 (7th Cir. filed Aug. 2, 2000);

Adland v. *Russ*, 107 F. Supp. 2d 782 (E.D. Ky. 2000) (granting preliminary injunction prohibiting relocation of Ten Commandments monument to grounds of state capitol), *appeal pending*, No. 00-6139 (6th Cir. filed Aug. 25, 2000);

ACLU v. *Pulaski County*, 96 F. Supp. 2d 691 (E.D. Ky. 2000) (granting preliminary injunction against display of Ten Commandments among other documents at county courthouse);

ACLU v. *McCreary County*, 96 F. Supp. 2d 679 (E.D. Ky. 2000) (granting preliminary injunction against display of Ten Commandments among other documents at county courthouse); and

Doe v. *Harlan County School District*, 96 F. Supp. 2d 667 (E.D. Ky. 2000) (granting preliminary injunction against display of Ten Commandments among other documents at public school).

Additional pending cases include:

Modrovich v. *Allegheny County*, No. 2:01-CV-531 (W.D. Pa. filed Mar. 20, 2001) (challenging display of Ten Commandments in county courthouse);

ACLU of Ohio Foundation v. *Ashbrook*, No. 1:01-CV-556 (N.D. Ohio filed Mar. 8, 2001) (challenging common pleas court judge's display of Ten Commandments on courtroom wall along with Bill of Rights and Ohio motto);

King v. *Richmond County*, No. 00-CV-100 (S.D. Ga. filed May 12, 2000) (challenging alleged depiction of Ten Commandments in court seal); and

Baker v. *Adams County*, No. C-1-99-094 (S.D. Ohio filed Feb. 9, 1999) (challenging school's inclusion of

Ten Commandments in Foundations of American Government display on school grounds).[6]

A decision in this case would provide much-needed guidance for resolving these and similar cases. In addition to providing definitive guidance on the scope and meaning of *Stone* v. *Graham*, this case would also afford an opportunity to clarify the minimum requirements for standing in such cases. *See Valley Forge Christian College* v. *Americans United for Separation of Church & State*, 454 U.S. 464 (1982); *ACLU-NJ* v. *Township of Wall*, No. 00-2075, 2001 WL 320914 (3d Cir. Apr. 3, 2001) (dismissing suit concerning holiday display for lack of standing); *Ala. Freethought Ass'n* v. *Moore*, 893 F. Supp. 1522 (N.D. Ala. 1995) (dismissing suit against state judge for displaying Ten Commandments in courtroom for lack of standing); *cf. Ex parte State ex rel. James*, 711 So. 2d 952 (Ala. 1998) (dismissing suit against state judge for displaying Ten Commandments in courtroom as nonjusticiable). Such guidance is especially appropriate now—*before* the federal courts are drawn further into a campaign of secular iconoclasm to cleanse public buildings and grounds of religious references.

Depictions of the Decalogue are not limited to the grounds of state capitols or, as in this case, municipal buildings. The Decalogue is depicted in a myriad of public buildings, including the courtroom of this Court. On the wooden doors to the courtroom, through which the public and Bar enter, are carvings of tablets with the roman numerals I through X. Similarly, the frieze of ancient lawgivers near the ceiling of the courtroom includes a depiction of Moses holding tablets representing the Ten Commandments. *See Lynch* v. *Donnelly*, 465 U.S.

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[6] This list is not exhaustive.

at 677. One of the oldest courtrooms in the United States is that of the Supreme Court of Pennsylvania in the old state capitol in Harrisburg, which contains a large mural depicting Moses and the Decalogue. The stairwell to the Great Hall in the headquarters of the United States Department of Justice has a similar mural of Moses and the Ten Commandments.

A decision in this case would assist public officials in managing public property in a fashion that comports with the First Amendment. As the examples above demonstrate, public buildings and grounds are often a place for monuments, plaques, and other displays meant to commemorate significant historical events and people. Frequently such monuments contain religious references, such as a quotation of or allusion to scripture. A decision in this case would assist public officials in determining how to treat such existing monuments and displays, and in deciding whether to accept gifts of such items in the future.

CONCLUSION

The petition for writ of certiorari to the United States Court of Appeals for the Seventh Circuit should be granted.

Respectfully submitted,

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